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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION 1

THE PEOPLE,

Plaintiff and Respondent,

v.

ALEC FACCONO,

Defendant and Appellant.

A142344

(Mendocino County
Super. Ct. No. SCTMCRCR 13-71398)

INTRODUCTION

Defendant Alec Faccone appeals from his conviction by plea of arson, burglary, possession of a short-barreled shotgun and possession of stolen property. After his attorney declared a doubt as to his competency, the trial court appointed two psychologists, both of whom concluded defendant was competent. Defendant nevertheless claims the court erred in failing to conduct a full competency hearing pursuant to Penal Code section 1368.¹ However, because there was no substantial evidence before the court that defendant was not competent and the court, itself, had not declared a doubt in that regard, no competency hearing was required. We therefore affirm the judgment.

BACKGROUND

We recite only those facts relevant to the issue on appeal.

Defendant burglarized three homes in February 2013. During the first burglary of a house in Fort Bragg, he stole firearms and set fire to the residence in an attempt to

¹ All further statutory references are to the Penal Code unless otherwise indicated.

eliminate evidence that he had been trying to “cook” methamphetamine. A few days later, he burglarized a second house in the town and took additional firearms. Later that month, police arrested him at a house in Mendocino after receiving a report of a burglary in process. Defendant had a number of firearms in his possession which turned out to have been stolen from various residences.

Pursuant to a plea agreement, defendant pleaded guilty to arson (§ 451, subd. (b)), second degree burglary (§§ 459, 460, subd. (b)), possession of a short-barreled shotgun (§ 33210) and possession of stolen property (§ 496, subd. (a)). The remaining charges were dismissed with *Harvey*² waivers.

On the date originally set for sentencing, defense counsel declared a doubt as to defendant’s competency pursuant to section 1368. The court suspended proceedings and appointed two psychologists, Dr. Shirikian and Dr. Kelly, to examine defendant. Both concluded he was competent, and the trial court did not conduct a hearing pursuant to section 1368.

The court did, however, grant defense counsel’s application under Evidence Code section 1017 to appoint a psychotherapist to advise counsel on possible mental defenses to aid counsel in evaluating whether to move to withdraw defendant’s guilty pleas. Defense counsel subsequently advised the court he did not intend to file a motion to withdraw the pleas.

Accordingly, the court proceeded with sentencing and asked whether there was any legal cause why judgment should not be pronounced. Defense counsel responded “No.” The trial court denied defendant’s request for probation and sentenced him to a total prison term of 10 years.

DISCUSSION

Defendant’s sole claim on appeal is that the trial court erred in failing to hold a competency hearing pursuant to section 1368. We review this ruling for abuse of discretion. (*People v. Welch* (1999) 20 Cal.4th 701, 742.)

² *People v. Harvey* (1979) 25 Cal.3d 754 (*Harvey*).

An individual cannot be “tried or adjudged to punishment . . . while that person is mentally incompetent. A defendant is mentally incompetent for purposes of this chapter if, as a result of mental disorder or developmental disability, the defendant is unable to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a rational manner.” (§ 1367, subd. (a).) It is statutorily presumed that a defendant is mentally competent unless he or she can prove by a preponderance of the evidence that he or she is not. (§ 1369 subd. (f).)

Under section 1368, either the trial court or defense counsel may declare a doubt as to a defendant’s competence. (§ 1368 subd. (a).) However, “[a] declaration of doubt by counsel alone is not sufficient to trigger a statutory right to a competency hearing.” (*People v. Garcia* (2008) 159 Cal.App.4th 163, 170 (*Garcia*).) Such a right arises only when the court expresses a doubt concerning defendant’s competency or there is substantial evidence of incompetence. (*People v. Johnson* (1991) 235 Cal.App.3d 1157, 1161.) “A trial court may appoint a psychiatrist to conduct a summary evaluation to help it decide whether to declare a doubt.” (*Garcia, supra*, at p. 170.) “Due process requires a competency hearing only if the court is presented with substantial evidence of incompetence.” (*Ibid.*)

People v. Stewart (1979) 89 Cal.App.3d 992, involved a similar factual situation. In that case, defense counsel declared a doubt as to the defendant’s competence, and the court ordered that a psychiatrist examine him. The psychiatrist concluded the defendant was competent. (*Stewart, supra*, 89 Cal.App.3d at pp. 995, 997.) *Stewart* explained “a defendant is not entitled to a trial on the issue of his mental competence merely upon the statement of defense counsel, but that there must be objective substantial evidence of doubt as to the defendant’s mental competence before he is entitled to a full hearing pursuant to section 1368.” (*Id.* at p. 996.) The court concluded a “full hearing under Penal Code section 1368 was not required under the circumstances . . . [because] there was no substantial evidence of doubt that appellant was competent to stand trial, and in such a situation the finding of the trial court should not be disturbed.” (*Id.* at p. 997.)

In this case, two psychologists examined defendant, and both concluded he was competent. Moreover, at no time in the proceedings did the trial court ever express doubt about defendant's competence. Thus, there was neither substantial evidence of incompetence, nor an expression of doubt by the court about it.

Defendant maintains the court did declare a doubt as to his competence, as evidenced by the following statement in its order suspending proceedings and appointing a medical examiner: "DOUBT HAVING ARISEN with the court, upon the declaration of counsel, as to defendant's present mental capacity to function competently in defendant's own defense and to understand the nature of the proceeding against him/her; [¶] NOW, THEREFORE, all proceedings in this matter are suspended until the question of the defendant's mental competency has be [sic] determined[.]" This statement cannot reasonably be understood to mean the court, itself, declared a doubt as to defendant's competency. It simply acknowledged defense counsel's expression of doubt.

Defendant further contends the court must have intended to declare a doubt because it suspended the proceedings, and never formally reinstated them. It is implicit, however, that the court reinstated proceedings after receiving the reports from the two psychologists since it proceeded with sentencing. Indeed, the court expressly inquired at the sentencing hearing whether there was any legal cause why judgment should not be pronounced, and defense counsel responded "No." Thus, the record reflects the defense's clear understanding proceedings were resuming and also reflects the defense had no objection.

In sum, defendant has demonstrated no abuse of discretion by the trial court in proceeding with sentencing and not conducting a competency hearing under section 1368.

DISPOSITION

The judgment is affirmed.

Banke, J.

We concur:

Humes, P. J.

Margulies, J.

A142344, *People v. Faccone*